United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

76-1195

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT OF NEW YORK

DOCKET NO. 76-1195

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UNITED STATES OF AMERICA,

Appellant,

- against -

ANTONIO FLORES,

Defendant-Appellee.

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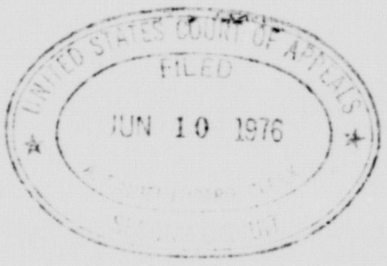
ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF AND APPENDIX FOR ANTONIO FLORES, APPELLEE



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I N T R O D U C T I O N

Assuming the Government has a right to appeal the pre-trial decision of the District Court, it is respectfully submitted that the major issue before this Honorable Court is;

> Will the Government be permitted to violate an agreement entered into between the Spanish Government and the United States Government which clearly states the terms by which Antonio Flores, Appellee herein, was extradited to this Country?

It is respectfully submitted that the Appellant is attempting to inject a smokescreen into this case by attempting to utilize evidentiary principles as an excuse to violate International Law. This Honorable Court is urged to disregard all parts of Appellant's brief that merely cloud the determination of the above question, particularly Point II, sub-point B and C.

It is further submitted that the allegations of the Government regarding the "Factual Description of the Conspiracy" (Appellant's brief, pages 3 - 6) should be given little or no consideration in determining the issue of International Law that is before this Honorable Court.

The allegations constitute the burden of proof for the Government at trial, and have no relevance for the purpose of this pre-trial determination of an important question of International Law. The Appellant's appendix is incorporated by reference herein. Appellee has attached additional pertinent exhibits to this brief.

STATEMENT OF FACTS

Appellee respectfully submits that the relevant facts concerning the instant case are as follows:

On January 8, 1973 a warrant of arrest was issued in the United States District Court for the Southern District of New York against Appellee Antonio Flores, for the alleged crime of conspiracy to transport and sell narcotic drugs in violation of Sections 173 and 174 of Title 21, United States Code during the period between January 1, 1968 and April 30, 1971. Indictment No. 73CR19. Another warrant of arrest dated April 5, 1973, had been issued by the Grand Jury of the United States District Court for the Eastern District of New York, for the alleged crime of conspiracy to receive, conceal, buy, sell, and facilitate the transport and concealment of heroin and cocaine, narcotic drugs, after they had been brought illegally to and imported into the United States, which crime was allegedly committed between January 1 and August 31, 1968, according to said indictment.

On March 31, 1973 Appellee Flores was arrested in Spain as a fugitive and for possession of a small quantity of marijuana and a forged passport. Appellee was incarcerated in Barcelona's Men's Prison and has not been at liberty since that time.

The United States sought Flores' extradition and a hearing was had at Barcelona, Spain, on November]3,]973 where all parties were duly represented. The United States requested the Spanish Government to extradite Appellee Flores. An extradition hearing was held by a duly constituted Court in Spain, a three judge panel.

Appellee Flores originally opposed extradition before the Spanish Court on the grounds that neither the Extradition Treaty of]904 nor the Extradition Treaty of May 29,]970, which was entered into force June]6,]97] (22 UST 737:TIAS 7136) was applicable to the period of the alleged conspiracy covered in the indictment, namely, January],]968 to April 30,]97].

The three judge panel that presided over the extradition hearing rendered it decision on November]3,]973. Presiding Judge Tomas Gonzalez Ramon Fernandez wrote the opinion for the panel of Examining Court No. 6 at Barcelona, Spain. The High Court of Spain held that:

> The defense argument concludes with the statement that at that time neither the (Extradition) Treaty of 1904, nor the Treaty of]970, now in force, was applicable. With respect to the Extradition Treaty of May 29,]970, between Spain and the United States o America, in force since June]6,]97], that statement is correct, and therefore the objection based on the lack of retroactive effects of the said Treaty is pertinent. (See Appellant's appendix A 55).

The High Court of Spain, also ruled that with respect to the Treaty of June 15, 1904 ratified by Spain April 6, 1908, and ammended by the subsequent Convention for the Suppression of Illicit Traffic in Dangerous Drugs, signed at Geneva June 26, 1936 and ratified by the United States in 1947 acquired full force and effect in Spain on September 16, 1970 and in full for ce as of September 3, 1970.

> The Geneva Convention of 1936 was subsequently replaced by the Single Convention on Narcotic Drugs on March 30, 1961 and entered into full force and effect for the United States on on June 24, 1967 and entered into full force and effect for Spain on March 1, 1966. (18 UST 1407; TIAS 6298),

that Articles 2 and 9 of the Treaty of 1904 covered any future treaty of extradition between Spain and the United States and, moreover, Article 2 also included 'conspiracy' to commit, inter alia, offenses relating to the traffic of narcotic drugs.

The High Court of Spain granted the United States request for extradition of Flores stating however that it was "expressly limited with respect to time to the acts committed between September 3, 1970 and April 30, 1971 excluding any previous or subsequent acts (emphasis added) and, furthermore, 'it is understood that the extradition is contingent upon the formal promise of the United States Government that the aforesaid person will

not be prosecuted for previous offenses foreign to this extradition request unless he expressly consents to such prosecution' (See Appellant's Appendix A 55 - A 59). The High Court of Spain further held that:

> "the requested extradition of the aforesaid Antonio Flores is denied with respect to the claim of Court of the Eastern District of New York and charges brought against him before the Court."
> (See Appellant's Appendix A 60)

Prior, during and subsequent to the above stated Court hearings and/or decision with regard to extradition of the appellee, Flores, the Government of Spain through its Ministry of Foreign Affairs, on its own initiative, and relied upon by Appellee and Appellees legal representatives in Spain and in the United States entered into "negotiations" with the United Staes Embassy Spain. Said negotiations were extradtion of Appellee , Flores, to assure Spain, Appellee Flores and his legal representatives that the Spanish Court's decision would be upheld by the Americans. On February 13, 1974, the American Embassy, representing the United States Department of State and Justice Department made a "formal Promise" to the Spanish Government, as required by the Spanish Court (See Government Appendix A 59). Said "formal promise" upon by the Spanish Government, the appellee Flores, and his Spanish and American counsel. Said reliance resulted in Appellee Flores, on advice of his counsel, electing to waive any further right of appeal in Spain on the

issue of extradition. The Appellee relied on the decision of the Spanish Court as augumented by the "formal promise" of the United States to abide by said decision. (See Appellant's Appendix A 43).

The Spanish Government also relied on said "formal promise", and extradited the appellee to the United States on February 14, 1974. Spain has evidenced its reliance on the aforementioned promise and expressed its displeasure of the actions of the United States Attorney's Office in prosecuting the appellee herein and the trial court's actions in upholding the right of the United States Attorney of the Southern District of New York to prosecute the appellee Flores for acts falling ourside of the period prescribed by the High Court of Spain (September 3, 1970 - April 30, 1971), by sending two formal notes of protest to the United States Government; Official Communication No. 30 on March 29, 1976 and Official Communication No. 38 on or about June 3, 1976 stating that the "formal promise of the United States has not been honored". (See Appellee Appendix No. 1 and 2).

Appellee Flores has remained incarcerated since the begining of extradition proceedings in Spain.

Appellee Flores has been and will continue to be subjected to American jurisdiction for "acts" outside of the time limit designated by Spain. This violation of jurisdiction has been condoned by a memorandum decision of Honorable Justice Dudley A. Bonsal, dated March 26, 1976 wherein the Court said:

> ".....the Government may introduce evidence of defendant's prior acts and conversations.....
> (See Appellant's Appendix A 65 - A 68)

The decision of the District Court was immediately rejected and protested by the Spanish Consulate in New York and Spanish Embassy in Washington on March 29, 1976. (See Appellee Appendix No. 1). The Government of Spain continued to protest the United States Attorney's actions and the actions of the Courts of the United States as exhibited by the making of the second formal protest on or about June 1, 1976, after having received all legal papers of this matter and having reviewed same.

> "..... the Formal Promise of February 13, 1974 by means of Verbal Note No. 136 of the United States Embassy in Madrid to the Spanish Government, has not been honored."
> (See Appellee Appendix, No. 2).

POINT I

THE GOVERNMENT DOES NOT POSSESS THE STATUTORY RIGHT UNDER TITLE 18 U.S.C.A. §3731 TO APPEAL THE PRE-TRIAL DECISION OF THE DISTRICT COURT TO THE COURT OF APPEALS

A. The pre-trial order is not a "suppression or exclusion of evidence" within the meaning of 18 U.S.C.A. §3731.

Appellee contends that pursuant to Title 18, United States Code, Section 3731 the United States is barred from appealing a pre-trial decision rendered on March 24, 1976, by the Honorable Dudley B. Bonsal, United States District Judge for the Southern District of New York.

> Antonia Flores' motion to limit the Govt.'s introduction of certain evidence at trial, etc. . . is disposed of accordingly. (See Appellants Appendix A6 and A65-A68).

Section §3731 provides in relevant part, that

> "An appeal by the United States shall lie to court of appeals from a decision or order of a district courts suppression or exlcuding evidence or requiring the return of seized property in a criminal proceeding not made after the defendant has been put in deopardy and before verdict or finding on an indictment or information, if the United States attorney certifies to the district court that the appeal is not taken for purpose of delay and that the evidence is a substantial proof of a fact material in the proceedings."

Section §3731 authorized government appeals ". . . from all suppressions and exclusions of evidence in criminal proceedings, except those ordered during trial of an indictment and information." The District Court's pre-trial order that "the extradition treaty applies only to crimes committed after September 3, 1970" cannot be characterized as a "suppression order" within the meaning of section 3731. The District Court decision involved an order delineating the permissible scope of acts for which the Appellee, Flores, could be prosecuted. The decision of the Trial Court was mandated by an extradiction decision of the "High Court of Spain" and a formal promise #136 of the United States. The District Court said:

> "We are not talking about rules of evidence, They [The acts of conspirators prior to September 3, 1970] are precluded by Treaty." (Appellants appendix, A147)

It is submitted that the District Court's pre-trial order in regard to the terms of the extradiction of Appellee (See Appellant's appendix A66) utilized the terminology "to limit" and did not utilize the terms of the statute, "to suppress or exclude", and, therefore can not be characterized as a suppression order within the scope of section 3731.

Appellee submits the said order is not appealable by the United States Attorney's Office for the Southern District of New York under section 3731.

Appellee respectfully contends that the District Court's decision to limit the scope of the "acts" for which Appellee could be tried was a decision mandated by the express terms of the "High Court of Spain," and is consistent with the United States obligation under International Law to carry out the terms of extradition of Appellee as prescribed by the asylum state, (Spain), and was not an order to suppress or exclude evidence as contemplated by §3731.

Section 3731 was amended to allow the government to appeal "suppression orders" at the District Court level. This was done to limit the harmful effects in the practice and development of the law of suppression. United States v Greely 413 F. 2d 1103 (Cir., 1969). Appellate courts had held "suppression orders" reviewable under this section, where the District Courts pre-trial order deals with evidence obtained during searches of defendants. United States v Beck 483 F. 2d 203 (3rd Cir., 1973); cert. den., 414 U.S. 1132 (1973).

However, there is no authority for the proposition, nor can an analogy be drawn, that a District Court's order to limit prosecution for "acts" occurring subsequent to the effective date of an extradition by an asylum state mandated by the express terms of a court of such a state falls within the meaning of a "suppression order" under section 3731.

Appellee further argues that the United States Attorney argued in open court that the decision of the District Court rendered March 26, 1976 was not appealable unless and until the time of conviction of Appellee:

> A. U.S.A. JOHN FLANNERY: There has been a discussion about the extradition agreement which your Honor considered in its decision of March 26th of this year. The decision of the District Court is a final decision, but not appealable until after the time of conviction. That is my understanding of the law and it obviously serves a purpose, so that at some point litigation can come to an end and decisions have to be made. (Emphasis Added) (See Appellant's appendix A84, pre-trial conference, April 13, 1976)

Appellee respectfully submits that District Court Judge Bonsal's pre-trial decision which be characterized as a "construction" under the extradition treaty, was exactly that which he stated it to be and not an order for a suppression motio as contemplated by section 3731.

Therefore, Appellee respectfully submits that the District Court's decision was not a "suppression order" within the meaning of section 3731, and prays that this Honorable Court rule that it does not possess the requisite jurisdiction to hear the government's appeal.

B. The government appeal should be dismissed because the "thirty day rule" of 18 U.S.C.A. § 3731 was not complied with.

Title 18 U.S.C.A. §3731 also directs that:

> "The appeal in all such cases shall be taken within thirty days after the decision, judgment or order has been rendered and shall be diligently prosecuted."

The Honorable Judge Bonsal rendered his decision on March 24, 1976. The government, however, did not file its notice of appeal until April 28, 1976, more than thirty days following entry of the decision. Clearly, the Appellant's notice of appeal was not timely and Appellant's appeal must be dismissed.

An appeal by the prosecution in criminal cases is not favored, and must be based upon express statutory authority. United States v Jaramillo, 510 F 2d 808 (8th Cir., 1975); United States v Beck, 483 F 2d 203 (3rd Cir., 1973); Government of Virgin Islands v Hamilton 475 F 2d 529 (3d Cir., 1973)

Appellant is precluded from taking an appeal, espe.ially an accelerated one such as the instant appeal, pursuant to §3731 since Appellant failed to appeal within the thirty day statutory time limit imposed by said section. Furthermore, the government's failure to proceed with its appeal until after the expiration of the thirty days following the date the District Judge's decision was handed down, cannot be considered diligent prosectution. United States v. Goldstein, 479 F.2d 1061 (2d Cir., 1973).

Appellee respectfully argues that the failure of the government to comply with the thirty day rule should bar its appeal.

C. The Appellees brief should be considered in the nature of a Cross Appeal because the Mandamus filed by Appellee was tantamount to the filing of a notice of appeal, and in the interest of justice.

The Appellee argues conversely that the mandamus filed in this h·.orable Court on April 13, 1976 (see Appellant's appendix 3) by Appellee, with due notice made to the District Court and Appellant on the same date (see Appellant's appendix A75) effectively operated as a notice of appeal duly filed on the issued presented by the order of Judge Bonsal dated March 24, 1976, and/or a Cross Appeal on the Appellant's accelerated appeal.

Appell·e submits that a mandamus is more relevant than an appearance bond which has been held to satis· the requirements of filing a Cross Appeal,

> "Treating criminal appearance bond as timely notice of appeal. - Where appellant's notice of appeal and motions for extension of time were deemed not timely under former Federal Criminal Rule 37 (a) (2) [superseded by Federal Appellate Rule 4 (b), substantially unchanged], the court treated Appellant's apperance bond executed and filed in the district court prior to entry of judgement, and reciting that the defendent has filed an appeal to this court and that the appeal is now pending, as "the equivalant of the filing of a written notice of appeal in the district court." United States v Conversano (CA 3d 1969) 412 F 2d 1143. The court noted: "[A]lthough it was filed prior to the entry of the judgment, it is treated as having been 'filed after such entry and on the day thereof' in accordance with the mandate of [former Federal Criminal] Rule 37 (a) (2)."

Benders Vol. 4 Federal Rules of Appellate Procedure at page 100.

Appellee prays that this honorable court rule that in the "interest of justice" of maintaining International Law and order that the instant brief be considered a valid Cross Appeal on the issues raised by the order of the district judge.

POINT II

The "Principle of Specialty" dictates a strict construction of asylum state decisions on extradition and adherance to said decisions in their entirety, by United States Courts, and the United States Government (Executive Branch).

> The "principle of specialty" long recognized in international law, provides that "the requisitioning state may not, without permission of the asylum state, try or punish the fugitive for any crimes for which he was extradited." Friedmann, Lissitzyn & Pugh, International Law 493 (1969); see generally 1 Moore, Extradition 194-259 (1891). In United States v Rauscher, 119 U.S. 407, 7 S. Ct. 234, 30 L. Ed. 425 (1886) the Supreme Court established the rule of domestic law that the courts of this country will not try a defendant extradited from another country on the basis of a treaty obligation for a crime not listed in the treaty. While this determination might appear to be limited to circumstances indicating a possible evasion of the treaty, the principle has been extended to bar prosecution for crimes listed in the treaty but for which extradition, for whatever, reason, was not granted. See Johnson v Browne, 205 U.S. 309, 27 S. Ct. 539, 51 L. Ed. 816 (1907); Greene v United States, 154 F. 401, 407-408 (5 Cir. 1907); see generally 1 Moore, supra, at 245-256. "Shapiro v Ferrandina" 478 F.2d804 at p. 905 (2nd Cir. 1973).

The Appellee respectfully request that this Honorable Court accept the promise that as a matter of international law, the principle of specialty has been viewed as a privilege of the asylum state, designed to protect itits dignity and interests. (See 1 Oppenheim, International Law 702 (th ed. Lauterpacht 1955); United States ex rel. Donnelly v Mulligan, 76 F.2d 511 (2 cir. 1935. "Shapiro v Ferrandina, 478 F2d 894 (2nd cir. 1973), and that any action by this Court that would be interpreted as violating the decree of the asylum state, Spain, would be a clear violation of International Law.

Appellee argues that the instant case is clearly distinguishable from United States v Fiocconi, 462 F.2d 475 (2nd Cir.]972). In Fiocconi this court held that its

> ".....conclusion that Italy (asylum state) would not consider the actions of the United States to be a breach of faith....."

was the overriding reason for upholding the extradition. In the instant case there is clearly no doubt of the displeasure of the asylum stae, Spain, as evidenced by two formal protests made by Spain to our government subsequent to the United States Attorney's attempt to violate the decision of the

Spanish Court and the District Courts' acquires acquiesance in part to the United States Attorney's nefarious designs.

Appellee argues that the decree of the Spanish Court is clear. The laws held that the defendants could not be subjected to trial before the Souther District Court for "acts" or "activities" or "infractions" falling outside of the period of limitation (September 3, 1970-October 30, 1971). "Acts" are defined as:

> Denotes affirmative; expression of will, purpose; carries idea of performance; primarily that which is done or doing; exercise of power, or effect of which power exerted is cause; a performance; a deed. Brown v. Standard Casket Mfg. Co., 234 Ala. 512, 175 So. 358, 364. In its most general sense, this noun signifies something done voluntarily by a person; the exercise of an individual's power; an effect produced in the external world by an exercise of the power of a person objectively, prompted by intention, and and proximately caused by a motion of the will. Herman v. Pan American Life Ins. Co., 183 La. 1045, 165 So. 195, 200. In a more technical sense, it means something done voluntarily by a person, and of such a nature that certain legal consequences attach to it. Jefferson Standard Life Ins. Co. v Myers, Com. App. 284 S.W. 216, 218. Thus a grantor acknowledges the conveyance to be his "act and deed," the terms being synonymous. It may denote something done by an individual, as a private citizen, or as an officer; or by a body of men, as a legislature, a council, or a court of justice; including not merely physical acts, but also decrees, edicts, laws, judgments, resolves, awards, and determinations. (Blacks Law Dictionary Fourth Edition, at p. 42)

Activity has been defined as:

> Activity A recreational "activity" is a physical or symnastic exercise, an agile performance such as dancing. McClure v Board of Education of City of Visalia, 38 Cal App. 500, 176 p 711, 712. (Blacks, Supra at p. 52)

Infraction has been defined as:

> Infraction A breach, violation, or infringement; as of a law, a contract, a right or duty. In French law, this term is used as a general designation of all punishable actions. (Blacks, Supra p 970)

(Appellee respectfully requests that this Honorable Court take judicial notice that France and Spain are civil law nations and utilize the same definitions for basic terms under their almost identical codes)

The District Courts order permitting the prosecution to try Appellee for "acts" or "activities" outside of the time limit prescribed by the High Court of Spain (September 3, 1970 - April 30, 1971) violates the contractual obligations of the treaty and the United States are without jurisdiction to so try him. U.S.v. Sobell, D.C.N.Y. 1956, 147 F. Supp. 515.

There is clear authority for the actions of the asylum state to delimit the alleged"acts" or "offenses" for which the Appellee could stand trial in the demanding state,

"A person surrendered can in no case be kept in custody....for any other crime or offence, or on account of any other matters, than those for which the extradition shall have taken place, until he has been restored, or has had the opportunity of returning, to the territories of the High Contracting Party by whom he has been surrendered." (U.S. TS 849, 47 Stat. 2122, 2124 see also Whiteman Vol 6 Digest of International Law, Exemptions from Extradition pp 885-889, People v Stout, (1894), 81 Hun 336, 30 N.Y.S. 898, affirmed 39 N.E. 858, 144 N.Y. 699; People v Hannan, 30 N.Y.S.370, 9 Misc. 600; (1894).

B. The "Diplomatic History" of the actions of the Governments of the United States and Spain, in regard to the instant case, are determinative when a decision is being rendered by an American Court.

> ". . . the constitution of a treaty by the political department of the government . . ." and the "diplomatic history . . . afford a basis for . . . conclusions." (Factor v. Lambenheimer, 290 U.S. 276 at 295, 78 L.Ed. 315 at p. 375 (1933)

and

> "when meaning is uncertain, recourse may not be had to the negotiations and diplomatic correspondence of the contracting parties relating to the subject matter and to their own practical construction of it. Cf. Re Rose, 140 U.S. 467, 35 L.Ed. 587, 11 Sup.Ct. Rep. 897; United States v. Texas, 162 U.S. 1, 23, 40 L.Ed., 867, 873, 16 Sup. Ct. Rep. 725; Kinkead v. United States, 150 U.S. 483, 486, 37 L.Ed. 1152, 1153, 14 Sup.Ct. Rep. 172; Terrace v. Thompson, 263 U.S. 197, 223, 68 L.Ed. 255, 277, 44 Sup. Ct. Rep. 15 (Nielson v. Johnson, 279 U.S. 52, 49 S.Ct. 223, F.2. L.Ed. 607 at 610

and

> Charleton v. Kelly 466-468 "States has always construed its obligation as embracing its citizens is illustrated by the action of the executive branch of the government in this very instance. (A constructive of a treaty by the political department of the government . . .is . . . of much weight)." (Charleton v. Kelly, 229 U.S. 447, at 468, 335 S.Ct. 945, 57 L.Ed. 1279 at 1283).

The "diplomatic history" or the instant case clearly illustrates the fact that Spain has complied with all of the tenets of international law and that the United States, by the acts of the United States Attorney's Office, Southern District of New York and the Southern District Court has abrogated the tenets, principles, and spirit of international law, all to the detriment to the Appellee.

Spain has protested to the United States actions. Appellee argues that it is significant to note the fact that between March 29 and June 3, 1976, at a time when Spain's Lords of State, the King and Queen of Spain, Juan Carlos and Sophia are visiting the United States, that only 8 communications have been sent by Spain to the United States, and two of them concerned the Appellee and the instant case!

The Government most strenuously argues that the seriousness of the alleged offense of Appellee should be considered by this Honorable Court when rendering its final decision on the instant appeal. Surely the Government should have weighed these factors when requesting extradition of Appellee and when making the formal promise as conditioned by

the Spanish Court. A binding decision by a foreign court, whether right or wrong morally, was acceded to by the United States and the formal promise of the United States Government only to serve to bind the United States further by contract to the terms and conditions pronounced by the High Court of Spain.

The United States realizes that they are not permitted to extend their jurisdiction beyond the limits set by the Spanish Court; whether the limitation be in regard to the prescribed period as set by the High Court of Spain 9/3/70 - 4/30/71) or the Spanish Court's order that Appellee may not be tried in the Eastern District. Wherefore Appellee argues that for this court to rule other than in favor of the Appellee, would certainly lead to the further false promise by the Government that the prohibition on the Eastern District decreed by the Spanish Court could fall by the wayside as well.

POINT III

A. THE DELIBERATE VIOLATION OF A PROMISE ENTERED INTO BY TWO SOVEREIGN STATES, THE UNITED STATES AND SPAIN, IS VIOLATIVE OF INTERNATIONAL LAW AND AN AMERICAN COURT MUST FIND SUCH AN ACT A VIOLATION OF AMERICAN LAW AND THEREBY VOID ITS OWN JURISDICTION OVER THE APPELLEE OR IN THE ALTERNATIVE IS BOUND TO ENFORCE THE COVENANT ENTERED INTO

Agreements between sovereign states are governed by principals of International Law:

"The Declaration of American Principles drawn up at Lima in 1938 by the American Republics recites:

> '4. Relations between States should be governed by the precents of international law.'
> Res. CX Report of the Delegation of the United States of America to the Eighth International Conference of American States, Lima 1938, pp. 190, 191.

"Article 5 of the Charter of the Organization of American States, signed at Bogota in 1948 reads:

> "The American States reaffirm the following principles:
>
> "a) International law is the standard of conduct of States in their reciprocal relations;
> b) International order consists essentially of . . . the faithful fulfillment of obligations derived from treaties and other sources of international law." U.S. TIAS 2361; 2 UST 2394, 2418.
>
> "The conduct of each State in its relations with other States and with the Community of States is subject to international law, and the sovereignty of a State is subject to the limitations of international law."
>
> Postulate 3, The International Law of the Future; Postulates, Principles and Proposals (Carnegie Endowment for International Peace, 1944) 5; 38 Am. J Int'l L. Supp. (1944) 41, 67.

"Article 14 of the Draft Declaration on Rights and Duties of States, prepared by the International Law Commission of the United States in 1949, provides:

> 'Every State has the duty to conduct its relations with other States in accordance with international law and with the principle and the sovereignty of each State is subject to the supremacy of international law.'

The United States, Spain, and most countries of the International Community are now subject to international law:

". . . That international law, to its full extent, is a part of the law of England and of the United States has been stated frequently by English and American judges. [See the Earl of Mansfield in Triquet v. Bath (1764), 3 Barrows 1478, Respublica v. Longchamps (1784), 1 Dallas iii; Marshall C.J. in The Nereide (1815), 9 Cranch 388; Lord Campbell, C.J., in Magdalena Steam Navigation Co. v. Martin (1859), 2 Ellis and Ellis 94; Turner, L.J., in Emperor of Austria v. Day and Kossuth (1861), Great Britain, High Court of Chancery, 2 Gilfard 621; Lord Alverstone, C.J., in West Rand Central Gold Mining Co. v. The King, (1905) 3 K.B. 391.] There are, further, Article VI, clause 2 of the Constitution of the United States and articles in recent European constitutions. [Weimar Constitution, 1919, Art. 4; Austrian Constitutions, 1920, Art. 9. 1934, Art. 9; Spanish Constitution, 1931, Art. 9. See also the present so-called Bonn Constitution (Grundgesetz).] "Emphasis supplied. 3 Digest of International Law, Whitehead at p. 35.

Article VI of the United States Constitution reads:

> ". . . All Treaties made, or which shall be made, under the authority of the United States, shall be the Supreme Law of the Land; and the Judges in every state shall be bound thereby anything in the Constitution of Laws of any State to contrary notwithstanding."

International Law is a part of the law of the United States; The Paguette Habana, 175 U.S. 677 (1900) at p. 700; the Lusitania, 251 Fed. 715, 732 (S.D.N.Y. 1918).

Appellee argues that to permit the District Court and United States Attorney for the Southern District of New York to violate the decisions of the High Court of Spain, and the subsequent "formal promise" of the United States would abrogate the extradition treaty between Spain and the United States, and/or the agreement entered into between the two high contracting parties (The United States and Spain). Such an abrogation would be in direct controvention of the Constitution of the United States, Article VI clause 2 and would be in violation of the Appellee's Constitutional Rights thereunder (14th Ammendent of the United States Constitution, etc).

Wherefore Appellee prays this Honorable Court will modify the order of the District Court so that Appellee may be properly within the framework of the decision of "The High Court of Spain," for alleged acts committed between September 3, 1970 and April 30, 1971, and/or in the alternative be returned to Spain.

B. ARTICLE VI OF THE UNITED STATES CONSITUTION DICTATES THAT THE AMERICAN GOVERNMENT MUST LIVE UP TO ITS TREATY COMMITTMENTS. AS THE HIGHEST LAW OF THE LAND, SUBSEQUENT TREATIES ENTERED INTO BY THE AMERICAN GOVERNMENT BIND THE UNITED STATES UNDER THE DOCTRINE OF "PACTA SUNT SERVANDA," TO EXCHANGE OF NOTES AND VERBAL AGREEMENT AS WELL AS TREATIES.

"Article 55 of the International Law Commission's draft on the "Law of Treaties" specified (under the heading "Pacta Sunt Servanda") that a treaty in force is binding upon the parties to it and must be performed by them in good faith."

> "The I.L.C. Commentary on Article 55 explains: 'Pacta sunt servanda --- the rule that treaties are binding on the parties and must be performed in good faith --- is the fundamental principle of the law of treaties.'
> U.N. Doc. A/CN. 4/L. 106/Add. 3, July 17, 1964.

> "Each State has a legal duty to carry out in full good faith its obligations under International Law, and it may not beinvoke limitations contained in its own constitution or laws as an excuse for a failure to perform this duty."

> "The Internation Law of the Future: Postulates Principles and Proposals (Carnegie Endowment for International Peace, 1944) 42; 38 Am. J. Int'lL. Supp (1944) 41, 73.

The Charter of the Organization of American States, approved at Bogata in 1948, provides (Article 14):

"Respect for and the faithful observance of treaties constitute standards for the development of peaceful relations among States...."

U.S. TIAS 2361; 2 UST 2394, 2419.

"The Duty to Abide by Treaty Obligations. Treaties, like custom, are law-creating facts and are binding upon the contracting parties. Thus one of the most ancient principles of International Law is pacta sunt servanda.'

Svarlien, An Introduction to the Law of Nations (1955) 131.

"But pacta sunt servanda has a narrower meaning, namely, that agreements (including everything from verbal arrangements and exchanges of notes to the most formal treaty) must be observed. Now, this is a specific rule forming part of the alleged international legal order....."

Corbett, Law and Society in the Relations of States (1951) 73. See 5 International Law Whiteman, pp. 220-224.

Under the doctrine of "abuse of rights (abus de droit) which is a recognized principle of International Law, (5 Digest of International Law p. 224), "a fictitious exercise of a right for the purpose of evading either a rule of law or a contractual obligation will not be tolerated.

Such an exercise constitues an abuse of the right, prohibited by law." Supra, at p. 225

The breach of promise (formal promise) by the United States Government in the instant case is clearly analogous to situations where a defendant pleads guilty in reliance on a prosecutor's promise which is not fulfilled. See Santobello v New York, 404 U.S. 257 1971. In Santobello, the United States Supreme Court held that when a guilty plea rests on a promise of the prosecutor which induces the plea, such promise must be fulfilled. Id. at 262-263.

It is respectfully submitted that an "abus de droit" exists at present in the instant case in that the District Court and United States Attorney violated the decision of the High Court of Spain, on Extradition, and or abrogated the 'formal promise' entered into by the United States with Spain. This Honorable Court is bound by International Law, and the United States Constitution (Act VI clause 2) to deny the Southern District Court jurisdiction to try Appellee for acts falling outside of the period of limitation decreed by the Spanish Court in its decision (9/3/70-4/30/71) and/or to enforce the terms of said 'formal promise' by denying said District Court jurisdiction in order to prevent a violation of International Law.

CONCLUSION

THE APPEAL OF THE GOVERNMENT SHOULD BE DISMISSED, OR THE DECISION OF THE DISTRICT COURT SHOULD BE AFFIRMED, OR, IN THE ALTERNATIVE, THE DECISION OF THE DISTRICT COURT SHOULD BE MODIFIED TO STRICTLY ENFORCE THE DECISION OF THE HIGH COURT OF SPAIN.

Respectfully submitted,

Stuart R. Shaw, Esq.
Attorney for the Appellee
600 Madison Avenue
New York, N.Y. 10022
212 755-5645

76-1195

UNITED STATES COURT OF APPEALS

For the Second Circuit

Docket No. 76-1195

UNITED STATES OF AMERICA,

Appellant,

---v.---

ANTONIO FLORES,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

APPELLEE'S APPENDIX

STUART R. SHAW, ESQ.
600 Madison Avenue
New York, New York 10022

A P P E N D I X

Consulado General de España

TO WHOM IT MAY CONCERN

At the request of Mrs. Stella Gómez de Flores, a Spanish national, living currently at Rosellón No. 21 - Entlo. la, Barcelona (15), Spain, wife of Mr. ANTONIO FLORES SERRANO, a U.S. citizen, I Mr. Alberto López Herce, Consul General of Spain in New York, do hereby declare that the judicial history of Mr. Antonio Flores Serrano's case has been forwarded to the Spanish Embassy in Washington, D.C., by official communication No. 30, on March 29th, 1976, to be transmitted to the State Department of the United States of America, since the Formal Promise of February 13th 1974 by means of Verbal Note No. 136 of the United States Embassy in Madrid to the Spanish Government, has not been honored. ----------

New York, N. Y. April 1st, 1976.

Alberto López Herce
Consul General

Consulado General de España

TO WHOM IT MAY CONCERN

At the request of Mrs. Esther Gómez de Flores, a Spanish national, residing at 432 Olmstead Avenue, Bronx, New York, 10473, wife of Mr. ANTONIO FLORES SERRANO, a U.S. citizen, I, Mr. Alberto López Herce, Consul General of Spain in New York, do hereby declare that the judicial history of Mr. Antonio Flores Serrano's case has been forwarded to the Spanish Embassy in Washington, D.C., by official communication No.30 on March 29, 1976, to be transmitted to the State Department of the United States of America, since the Formal Promise of February 13, 1974 by means of Verbal Note No. 136 of the United States Embassy in Madrid to the Spanish Government, has not been honored. The said Protest was transmitted to the State Department by the Spanish Embassy in Washington by official communication No.38.----------

New York, N.Y., June 3, 1976.

Alberto López Herce
Consul General

2

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

ANTONIO FLORES,

Petitioner,

-against-

HON. DUDLEY BONSAL, UNITED STATES DISTRICT JUDGE, SOUTHERN DISTRICT OF NEW YORK,

Respondent.

Docket No. 76 3070

PETITION FOR WRIT OF MANDAMUS AND APPLICATION FOR INTERIM STAY

Upon the annexed affidavit of STUART R. SHAW, ESQ., the Petitioner's Appendix submitted herewith and all proceedings heretofore had herein, specifically, the Memorandum Decision by Hon. J. Dudley Bonsal, District Judge, Southern District of New York, dated March 24, 1976, Exhibit 1 attached hereto; Motion and written argument of Howard Diller, Esq., attorney for Petitioner, dated February 26, 1976, Exhibit 2 attached hereto; Government's Memorandum of Law by Assistant United States Attorney Jeffrey Harris, Exhibit 3 attached hereto; Decision of the Examining Court, Barcelona, Spain, dated November 13, 1973, Exhibit 4 attached hereto; the Letter of Protest of the Consul General of Spain, dated April 1, 1976, Exhibit 5 attached hereto; the "formal promise" of the American Embassy, dated February 26, 1974, Exhibit 6 attached hereto; the Memorandum of Law written by Stuart Shaw, Esq., Exhibit 7 attached hereto; and Motions for Reargument in District Court by Stuart Shaw, Esq., dated April 7, 1976, attached hereto as Exhibit 8; the petitioner, ANTONIO FLORES, prays:

3.1

A. That an Order be issued, directed to the Hon. Dudley Bonsal, Judge of the United States District Court for the Southern District of New York, requiring him to show cause in this Court, at a time to be designated, why the petitioner should not be granted a continuance with regard to the trial of Indictment No. 73 CR 19; and

B. That a Writ of Mandamus issue from this Court directing the Hon. Dudley Bonsal to give petitioner a continuance with regard to the trial of the above noted indictment, until such time that it is determined that the Court has jurisdiction to try the matter; that the American and Spanish governments report to the Court in regard to the fruits of their negotiations; and

C. That petitioner have such additional relief and process as may be necessary and appropriate under the circumstances, specifically an order prohibiting the Government from producing any evidence at trial fo the Petitioner of any alleged acts of the Petitioner that do not fall within the period of time September 3, 1970 to April 30, 1971 as set forth in the decision of the Examining Court of Barcelona, Spain (11/13/73) (Exhibit 4) and the formal province of the American

Embassy (2/20/74) to the Government of Spain (Exhibit 6); and

D. That, pending the hearing and determiniation of this petition, this Court issue an interim order staying the commencement of the trial herein which is presently scheduled to commence on April 13, 1976.

Respectfully submitted,

New York, New York
April 13, 1976

STUART R. SHAW, ESQ.
Attorney for Petitioner
600 Madison Avenue
New York, N.Y. 10022
(212) 755-5645

To: Clerk,
United States Court of Appeals
for the Second Circuit

Hon. Dudley Bonsal
United States District Judge
Southern District of New York

Hon. Robert D. Fiske, Jr.
United States Attorney
Southern District of New York
Att: John Flannery, Esq.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

----------X

UNITED STATES OF AMERICA

-against-

ANTONIO FLORES,

Petitioner-Defendant.

----------X

ATTORNEY'S AFFIDAVIT

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

STUART R. SHAW, being duly sworn, deposes and says:

1. I am an attorney at law duly admitted to practice before the Second Circuit Court of Appeals and before the Southern District Court of New York.

2. I have been retained by the family of the petitioner to prepare a motion for reargument of the memorandum decision issued by the Honorable Judge Dudley B. Bonsal in the Southern District of New York and to prepare papers and subnit them on a writ of mandamus to this Honorable Court in the event that Judge Bonsal does not give a favorable decision on the aforementioned motion papers.

3. I have been retained to do the aforementioned work because of the fact that Howard Diller, Esq., the attorney of record was on trial in the State Supreme Court and was unable

the defendant herein could be extradited from Spain to the United States if he were only tried for acts falling within a specific period - September 3, 1970 through April 30, 1971.

5. Thereafter, a formal promise was entered into between the United States and Spain wherein the United States agreed not to try the defendant for any acts falling outside the aforementioned period of time. The defendant waived any right to appeal the aforementioned decision of the Court in Barcelona, Spain and relied on said decision and the aforementioned formal promise.

6. Petitioner was extradited to the United States and was prepared to go to trial for acts committed within the aforementioned period of time. The Justice Department moved through the United States Attorney's Office for the right to present evidence against the defendant for acts that occurred outside the aforementioned period of time. The Honorable Judge Bonsal in the Southern District Court granted the Government's motion. The Consul General of Spain immediately filed a letter of protest against the Judge's decision and the actions of the Justice Department with the United States Covernement.

7. On information and belief, there are presently negotiations taking place between the American State Department and the Spanish Covernment, through its Embassy in Washington, D. C., regarding the aforementioned breach of the formal promise by the American Covernment.

8. That your Petitioner appeared before Hon. T. Bonsal at 9:30 AM on 4/21/71 on the motions filed on 4/7/71, and that I [illegible] (3.) of the fact that a Petition was filed in the Court of Appeals

WHEREFORE, the defendant respectfully prays that this Honorable Court issue a writ of mandamus dismissing the criminal indictment against the defendant herein; or in the alternative, staying the United States Government from proceeding with the trial and granting the defendant a continuance; or in the alternative, ordering the Court to hold a hearing on the issues presented in the defendant's motions in the Southern District Court.

STUART R. SHAW

Sworn to before me
this 12th day of April 1976

Kathleen M. Fowler

KATHLEEN M. FOWLER
NOTARY PUBLIC, State of New York
No. 30-[illegible]
Qualified in Nassau County
Commission Expires March 30, 1978

(cont'd from the preceding page)

Simultaneously, case was set down for a pre-trial conference on 4/15/76 and for trial 4/21/76,

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------X

UNITED STATES OF AMERICA

-against-

EDUARDO FLORIT,

Defendant.

Index No. 733 CR. 19
(S.D.N.Y.)

----------X

MEMORANDUM OF LAW

Stuart R. Hoff, Esq.
666 Madison Avenue
New York, New York 10022
(212) 755-5545
751-3160

EXHIBIT 7

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

----------X

UNITED STATES OF AMERICA

-against-

ANTONIO FLORES,

Defendant.

----------X

Index No. 73 CR. 19
(D.B.B.)

MEMORANDUM OF LAW

Facts

The initial facts of this case as stated in the papers submitted by Howard Diller, Esq., on February 26, 1976, do not appear to be in issue. Said facts are as he stated:

"On January 8, 1973 a warrant of arrest was issued in the United States District Court for the Southern District of New York against Antonio Flores for the crime of conspiracy to transport and sell narcotic drugs in violation of sections 173 and 174 of Title 21, United States Code during the period between January 1, 1963 and April 30, 1971.

"On March 23, 1973 Flores was arrested as a fugitive and incarcerated in Barcelona's Men's Prison and has not been at liberty since then. Subsequently, the United States sought Flores' extradition and a hearing was finally had at Barcelona, Spain, on November 13, 1973 where all parties were duly represented.

"The Government attorney requested the Spanish Court to grant the extradition of Flores to the United States after he shall have served any sentence imposed for violation of Spain's passport laws and its law relating to the illegal possession of marihuana.

"Flores had opposed extradition on the grounds that neither the Extradition Treaty of 1904 nor the Extradition Treaty of May 29, 1970, which was entered into force June 16, 1971 (22 UST 737; TIAS 7136) was applicable to the period of the alleged conspiracy covered in the indictment, namely, January 1, 1969 to April 30, 1971.

"Pursuant to the hearing thus held, a decision was rendered by Examining Court No. 6 at Barcelona, Spain, by Presiding Judge Tomas Gonzales Ramon Fernandez on November 13, 1973. The Court ruled with respect to Flores' contentions as follows:

"(1) The Treaty of May 29, 1970, effective June 16, 1971, could not be made applicable to the defendant since its effective date is subsequent to the time period set forth in the indictment: April 30, 1971.

"(2) However, the Treaty of June 15, 1904 ratified by Spain April 6, 1905, and amended by the subsequent Convention for the Suppression of Illicit Traffic in Dangerous Drugs, signed at Geneva June 26, 1936 and ratified by the United States in 1947 acquired full force and effect in Spain on September 16, 1970 and in full force as of September 3, 1970.*

* The Geneva Convention of 1936 was subsequently replaced by
(footnote continued on next page)

3.10

"The Court further held that articles 2 and 9 of the Treaty of 1904 covered any future treaty of extradition between Spain and the United States and, moreover, Article 2 also included 'conspiracy' to commit, inter alia, offenses relating to the traffic in narcotic drugs.

"The Court thus granted the United States' request for extradition of Flores stating however that it was 'expressly limited with respect to time to the acts committed between September 3, 1970 and April 30, 1971 excluding any previous or subsequent acts', (emphasis added) and, furthermore, 'it is understood that the extradition is contingent upon the formal promise of the United States Government that the aforesaid person will not be prosecuted for previous offenses foreign to this extradition request unless he expressly consents to such prosecutions.' "

Prior, during and subsequent to the above stated Court hearings and/or decisions in regard to extradition of the defendant Flores, the Government of Spain through its Ministry of Foreign Affairs, on its own initiative and/or on the initiative of the defendant's legal representatives in Spain entered into

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* the Single Convention on Narcotic Drugs on March 30, 1961 and entered into full force and effect for the United States on June 24, 1967 and entered into full force and effect for Spain on March 1, 1966. (18 UST 1407; TIAS 6298)

3.11

negotiations with the United States Embassy in Spain in regard to the extradition of Antonio Flores, to assure Spain and Flores that the Spanish Court's decision would be upheld by the Americans. On February 13, 1974, the American Embassy, representing the United States Department of State and the Justice Department, made a "formal promise" to the Spanish Government, relied on by the Spanish Government and the defendant, Flores, and his Spanish and American counsel that the defendant would be subjected to American jurisdiction solely for "violations" within the time period prescribed by the Spanish Court. (See Exhibit 6.)

Flores was not transported to the United States until over a year later. Floris has remained incarcerated during the entire period of time denoted herein. Flores has been and will continue to be subjected to American jurisdiction for "acts" outside of the time period agreed to. This violation of jurisdiction has been condoned by a memorandum decision of Honorable Justice Dudley R. Donsal dated March 26, 1976 wherein the Court held,

> ". . .the Government may introduce evidence of defendant's prior acts and conversations . . ." (See Exhibit No. 1)

The decision of the Court was immediately rejected by the Spanish Consulate in New York via the Consul General who unequivocally terms the Court's action as violative of the

3 of 2

province of the American Government entered into by Spain and the United States upon which Spain and the defendant relied:

> ". . .the formal promise of February 13, 1974 by means of Verbal Note No. 136 of the United States Embassy in Madrid to the Spanish Government, has not been honored." (See Exhibit No. 5)

IS THE DELIBERATE VIOLATION OF A PROMISE ENTERED INTO BY TWO SOVEREIGN STATES, THE UNITED STATES AND SPAIN, VIOLATIVE OF INTERNATIONAL LAW AND IF SO, MUST AN AMERICAN COURT FIND SUCH A VIOLATION A VIOLATION OF AMERICAN LAW AND THEREBY VOID ITS OWN JURISDICTION OVER THE DEFENDANT OR IN THE ALTERNATIVE BE BOUND TO ENFORCE THE COVENANT ENTERED INTO?

Agreements between sovereign states are governed by principals of International Law:

> "The Declaration of American Principles drawn up at Lima in 1938 by the American Republics recites:
>
> > '4. Relations between States should be governed by the precents of international law.' Rep. CX Report of the Delegation of the United States of America to the Eighth International Conference of American States, Lima 1938, pp. 190, 191.
>
> "Article 5 of the Charter of the Organization of American States, signed at Bogota in 1948 reads:
>
> > "The American States reaffirm the following principles:
> >
> > "a) International law is the standard of conduct of States in their reciprocal relations;
> > b) International order consists essentially of . . .the faithful fulfillment of obligations derived from treaties and other sources of international law." U.S. TIAS 2361; 2 UST 2394, 2418.

"The conduct of each State in its relations with other States and with the Community of States is subject to international law, and the sovereignty of a State is subject to the limitations of international law."

Postulate 3, The International Law of the Future; Postulates, Principles and Proposals (Carnegie Endowment for International Peace, 1944) 5; 38 Am.J.Int'l. L.Supp. (1944) 41, 67.

"Article 14 of the Draft Declaration on Rights and Duties of States, prepared by the International Law Commission of the United States in 1949, provides:

> 'Every State has the duty to conduct its relations with other States in accordance with international law and with the principle and the sovereignty of each State is subject to the supremacy of international law.' "

The United States, Spain, and most countries of the International Community are now subject to international law:

". . .That international law, to its full extent, is a part of the law of England and of the United States has been stated frequently by English and American judges. [See the Earl of Mansfield in Triquet v. Bath (1764), 3 Barrows 1478; Respublica v. Longchamps (1784), 1 Dallas 111; Marshall C.J. in The Nereide (1815), 9 Cranch 388; Lord Campbell, C.J., in Magdalena Steam Navigation Co. v. Martin (1859), 2 Ellis and Ellis 94; Turner, L.J., in Emperor of Austria v. Day and Kossuth (1861), Great Britain, High Court of Chancery, 2 Gilfard 621; Lord Alverstone, C.J., in West Rand Central Gold Mining Co. v. The King, [1905] 3 K.B. 391.] There are, further, Article VI, clause 2 of the Constitution of the United States and articles in recent European constitutions. [Weimar Constituti-on, 1919, Art. 4; Austrian Constitutions, 1920, Art. 9, 1934, Art. 9; Spanish Constitution, 1931, Art. 9. See also the present so-called Bonn Constitution (Grundgesetz).]" Emphasis supplied. 3 Digest of International Law, Whitehead at p. 35.

Article VI of the United States Constitution reads:

". . .All Treaties made, or which shall be made, under the authority of the United States, shall be the Supreme Law of the Land; and the Judges in every state shall be bound thereby anything in the Constitution of Laws of any State to contrary notwithstanding."

International Law is a part of the law of the United States; The Paquette Habana, 175 U.S. 677 (1900) at p. 700; the Lusitania, 251 Fed. 715, 732 (S.D.N.Y. 1918).

ACT VI OF THE UNITED STATES CONSTITUTION DICTATES THAT THE AMERICAN GOVERNMENT MUST LIVE UP TO ITS TREATY COMMITMENTS. U. S. CONSTITUTION, SUPRA. SUBSEQUENT TREATIES ENTERED INTO BY THE AMERICAN GOVERNMENT BIND THE UNITED STATES UNDER THE DOCTRINE OF "PACTA SUNT SERVANDA" TO EXCHANGES OF NOTES AND VERBAL AGREEMENT AS WELL AS TREATIES.

"Article 55 of the International Law Commission's draft on the 'Law of Treaties' specified (under the heading 'Pacta Sunt Servanda') that 'a treaty in force is binding upon the parties to it and must be performed by them in good faith'.

"The I.L.C. Commentary on Article 55 explains: 'Pacta sunt servanda -- the rule that treaties are binding on the parties and must be performed in good faith -- is the fundamental principle of the law of treaties'. U.N. Doc.A/CN.4/L.106/Add.3, July 17, 1964.

"Each State has a legal duty to carry out in full good faith its obligations under international law, and it may not be invoke limitations contained in its own constitution or laws as an excuse for a failure to perform this duty.'

"The International Law of the Future: Postulates, Principles and Proposals (Carnegie Endowment for International Peace, 1944) 42; 38 Am.J.Int'l L.Supp (1944) 41, 73.

The Charter of the Organization of American States, approved at Bogata in 1948, provides (article 14):

"Respect for and the faithful observance of treaties constitute standards for the dvelopment of peaceful relations among states . . ."

U.S. TIAS 2361; 2 UST 2394, 2419.

. . .

'The Duty to Abide by Treaty Obligations. Treaties, like custom, are law-creating facts and are binding upon the contracting parties. Thus one of the most ancient principles of international law is pacta sunt servanda.'

Svarlien, An Introduction to the Law of Nations (1955) 131.

"But pacta sunt servanda has a narrower meaning, namely, that agreements (including everything from verbal arrangements and exchanges of notes to the most formal treaty) must be observed. Now, this is a specific rule forming part of the alleged international legal order . . ."

Corbett, Law and Society in the Relations of States (1951, 73."

See 5 International Law Whitehead pp. 220-224.

Under the doctrine of "abuse of rights (abus de droit) which is a recognized principal of international law, (5 Digest of International Law p. 224), "a fictitious exercise of a right for the purpose of evading either a rule of law or a contractual obligation will not be tolerated. Such an exercise constitutes an abuse of the right, prohibited by law." Supra, at p. 225.

It is respectfully submitted that an "abus de droit" exists in the instant case in the violation of the decision and/or

formal promise and that this Honorable Court is bound by International Law, and the United States Constitition, to deny itself jurisdiction, and/or to enforce the terms of said "formal promise."

Defendant relies on U. S. v. Toscanino, 500 Fed. 2d 267 (2d Cir. 1974) despite the fact the government may lay claim to said case also. In Toscanino, J. Mansfield's opinion relied in part on the 14th Amendment:

> ". . . Accordingly we view due process as now requiring a court to divest itself of jurisdiction over the person of the defendant where it has been acquired as the result of the government's deliberate, unnecessary and unreasonable invasion of the accused's constitutional rights. This conclusion represents but an extension of the well-recognized power of federal courts in the civil context to decline to exercise jurisdiction over a defendant whose presence has been secured by force or fraud. See In re Johnson, 167 U.S. 120, 126, 17 S.Ct. 735, 42 L.Ed. 103 (1896); Fitzgerald Construction Co. v. Fitzgerald, 137 U.S. 98, 11 S.Ct. 36, 34 L.Ed. 608 (1890)"

Defendant argues that the reasoning of J. Anderson in the concurring opinion at p. 281 (supra) is even more persuasive because of the instant fact situation wherein our State Department's promise has been broken by a court order in violation of a treaty right.

> ". . .Our government, lacking power to seize, lacked power, because of the Treaty, to subject the vessel to our laws. To hold that adjudication may follow a wrongful seizure would go far to nullify the purpose and effect of the Treaty. Compare United States v. Rauscher, 119 U.S. 407, [7 S.Ct. 234, 30 L.Ed. 425]." 288 U.S. at 121-122 (emphasis supplied)."

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"..Further, defendant did not enter this country pursuant to any treaty; he is, therefore, 'not clothed' in any treaty rights and cannot invoke the extradition treaty or the charters of the Organization of American States and the United Nations as personal defenses, United States v. Sobell 142 F.Supp. 515 (S.D. N.Y. 1956) (Kaufman, Judge), aff'd. F.2d 520 (2 Cir.), cert. den. 355 U.S. 873, 78 S.Ct. 120, 2 L.Ed. 2d 77 (1957)." (p. 281, 282)

Defendant argues that a violation of the treaty and "formal promise" between the United States and Spain necessitates a finding by this Court of a lack of jurisdiction to try a case involving the defendant where acts or violations are placed into evidence outside the fine confines of said promise, September 3, 1970 - April 30, 1971.

American Courts have looked for guidance from the State Department of the United States on issues involving foreign sovereigns and International Law. National City Bank of New York v. Republic of China, 75 S.Ct. 422, 99 L.Ed. 389, Isbrandtsen Tankers, Inc. v. President of India, 446 F.2d 1198. The executive branch's decisions have been followed by American Courts. Sullivan v. State of San Paulo, 122 F.2d 355 (CCA, N.Y. 1941) Under the doctrine of Separation of Powers as set forth by the United States Constitution, Act II, §1, §2(2), the Judicial Branch (the Courts) have waived jurisdiction on issues that are in the Executive's (State Department's) domain.

Defendant argues that "violent" or "slick" fraud are not to be placed on a different footing. The key issue to be

3.17

considered is whether or not a fraud exists or was committed. The Court must abide by International Law and decline jurisdiction over the defendant an/or cure the defect by enforcing the agreement entered into between the United States Department of State and Spain. To do otherwise would be violative of Article 6 and Article 14 of the United States Constitution. It is respectfully argued that the Court in the instant case must either waive jurisdiction over the subject matter or grant a hearing affording defendant the opportunity to present evidence and call witnesses on this issue. If the Court elects the latter course, then of course a stay of the trial must be granted. The Court must also stay the trial, it is respectfully argued, because diplomatic negotiations are being entered into by the Executive branch, the State Department and the sovereign nation of Spain, as evidenced by the letter of protest dated April 1, 1976 (Exhibit No. 5.)

Respectfully Submitted,

Dated: New York, New York
April 7, 1976

STUART R. SHAW
Attorney for Defendant
600 Madison Avenue
New York, New York 10022

3.18

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------X

UNITED STATES OF AMERICA,

-against-

ANTONIO FLORES,

Defendant.

----------X

Index No. 73 CR 19
(D.B.B.)

NOTICE OF MOTION FOR RE-ARGUMENT AND/OR A FORMAL HEARING ON ISSUE OF INTRODUCTION OF EVIDENCE BY PROSECUTION AT TRIAL AND MOTION TO DISMISS FOR LACK OF JURISDICTION

S I R S :

PLEASE TAKE NOTICE that upon the annexed affidavit of STUART P. SHAW, dated April seventh, 1976, and the annexed papers and exhibits attached hereto, the undersigned will move this Court, on Tuesday, April 13, 1976, or as soon thereafter as this matter might come before this Honorable Court, for an order precluding the United States from introducing any evidence against the above-named defendant, at trial, in the prosecution of the above-named indictment, and for a hearing on said issues where the defendant and prosecution may produce witnesses and other viable proof, for an adjournment or stay of the trial of the instant indictment until such a hearing or determination is had, and for such other and further relief as to this Court may seem necessary, proper and in the interest of justice.

Dated: New York, New York
April 7, 1976

Yours, etc.

STUART P. SHAW, ESQ.
600 Madison Avenue
New York, New York 10022
(212) 755-5645
751-5200

EXHIBIT 8

3.19

TO: Hon. Dudley B. Bonsal
United States District Judge
Southern District of New York

United States Attorney
Hon. Robert B. Fiske, Jr.
1 St. Andrews Plaza
New York, New York 10007

3.20

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------X

UNITED STATES OF AMERICA — INDEX No. 73 CR 19

-against- — ATTORNEY'S AFFIDAVIT

ANTONIO FLORES,

Defendant.

----------X

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

STUART R. SHAW, being duly sworn, deposes and says:

1. That I have been retained by relatives of the defendant herein to move for the relief requested herein.

2. That I have met with the defendant and have discussed with him the facts surrounding his extradition from Spain at the behest of the United States Department of State, and the United States Department of Justice.

3. That I have read the decision of this Honorable Court (a copy of which is annexed hereto as Exhibit 1) in regard to a motion brought on by HOWARD DILLER (a copy of which is annexed hereto as Exhibit 2), attorney for the defendant, and a brief in response submitted by AUSA Jeffrey Harris in behalf of the government (a copy of which is annexed hereto as Exhibit 3) in a careful and though-provoking manner. Said decision discussed in part the relief requested herein.

3.21

4. That it is the considered opinion of counsel, after studying the Court's learned decision, that the Court was not apprised of all of the facts in regard to this matter when the Court entered into its decision; that a hearing and/or an opportunity for reargument of this issue should be afforded to defendant in the interest of justice.

5. That the following information was not made available to the Court by the defendant, upon making the aforementioned previous request for the relief prayed for herein, because it was either unavailable, not translated yet or not in existence yet. That the government had some of this information and did not present same to the Court. (Specified as Exhibits No. 4 and 5)

6. It is respectfully submitted that all of the newly submitted information as outlined in paragraph 5 herein, as well as all of the papers submitted, should be read, considered, reviewed and digested by this Honorable Court before the Court rests on the previously entered determination and ruling on this critical question at hand. Defendant concedes that the prosecution should have time to digest and respond to the aforementioned materials as well, and the right to call witnesses should be afforded to defendant and the prosecution at a hearing before a possible trial.

7. That a hearing is the only means whereby the defendant can adequately demonstrate that the above materials

bear out defendant's version of the facts which would most definitely preclude this Court from exercising any jurisdiction whatsoever over the defendant, except for any and all acts of the defendant committed by him in the specifically limited period of time starting from September 3, 1970 and running through April 30, 1971 ("excluding any previous or subsequent acts" [emphasis added]), as denoted and required by the previously alluded to decision of the Examining Court No. 6 at Barcelona, Spain, by Presiding Judge Tomas Gonzalez, Ramon Fernandez, dated November 13, 1973. Said decision is annexed hereto as Exhibit No. 4.

8. That the above noted decision of November 13, 197 by the Examining Court, Barcelona, Spain, stating that extradition of the defendant herein would be granted by Spain only if defendant were tried expressly for acts committed between September 3, 1970 and April 30, 1971, was bolstered by an agreement which was entered into between the United States Government (the Department of Justice and the State Department) and the Spanish Government (the Ministerio de Justicia, an equivalent or counterpart of the United States State Department), wherein the United States Government promised to abide by the aforementioned ruling of the court in Barcelona, Spain, November 13, 1973, as evidenced by the body of a letter of agreement from the United States Embassy, dated February 13, 1974, attached here as Exhibit 6. Said agreement clearly states as follows:

"The Embassy of the United States of America, most graciously greet the Ministry of Foreign Affairs and has the honor of making reference to Verbal Note No. 55 of that Department, REF. 23-Ext.-73 dated February 8, 1974, with regard to the extradition of the North American citizen ANTONIO FLORES, When the abovementioned Verbal Note was received from the Ministry, the Embassy, by telegraph contacted the Department of Justice of the United States of America, by way of the Department of State in Washington D.C., in order to assure the formal promise which that Ministry requested at the petition of the Ministry of Justice. The answer which has just arrived at the Embassy offer the specific assurance on the part of the Department of Justice that ANTONIO FLORES shall not be processed in the United States of America for violations prior or which may be foreign to those concretely referred to in the decision portion of the Decision Handed down by the Provincial Court of Barcelona dated November 13, 1973. The Embassy of the United States of America takes this opportunity to reiterate to the Ministry of Foreign Affairs its assurance of the highest consideration." [Emphasis added]

9. That because of the above-mentioned promise by the United States Government there was a reliance thereon by the Spanish Government and by the defendant herein, in that his lawyers ceased to defend against the extradition from Spain to the United States pursuant to the order of the Barcelona Court dated November 13, 1973, and the above promise dated February 20, 1974.

10. That any act conferring jurisdiction over this defendant at a trial in the United States for acts allegedly committed by this defendant that fall outside of the specific period, as stated by the Spanish Court, of September 3, 1970 and April 30, 1971 would be a transgression of International Law and

violative of the defendant's rights under the United Nations Charter, the Declaration of Rights of Men, and the 14th Amendment of the United States Constitution, the New York Constitution (the State wherein he is now lodged), etc. (These issues will be more clearly defined in a brief accompanying this motion and affidavit.)

11. That the instant issueswas not clearly, concisely and completely presented to this Honorable Court, as noted heretofore. That the Spanish Government has objected to the Court's decision to grant the prosecution the right to present evidence of acts fully outside of the aforementioned judicially decreed time period of September 3, 1970 through April 30, 1971 as documented by the letter attached hereto as Exhibit No. 5 a letter indicating in no uncertain terms that the Spanish Government has protested this Honorable Court's decision; that said letter of complaint, Exhibit No. 5 attached hereto is, on information and belief, being considered by the United States Government at this very moment, and that it is indeed possible that the United States Government might concede and/or give up jurisdiction over the person of the defendant entirely and/or for any period outside of that previously prosecuted by a duly constituted court in Spain and by a "formal promise" of the United States Government.

12. It is respectfully submitted that technically this Court does not have jurisdiction to hear argument in the instant

case on the issue of testimony in a trial falling outside of the time limit set forth by the Spanish Court of September 3, 1970 to April 30, 1971 (See brief attached hereto).

13. That the defendant has the right , and wishes to exercise the right of calling witnesses at a hearing to prove his contentions as set forth herein. That upon information and belief, representatives of the Spanish Government would voluntarily come forth to testify to the facts as set forth herein. That the Government of the United States would be unable to call any witnesses who could testify in a way contrary to the facts set forth herein, namely that the United States Government entered into a "formal promise" "that Antonio FLORES shall not be processed in the United States of America for violations prior or which may be foreign to those concretely referred to in the decision . . . by the Provincial Court of Barcelona dated November 13, 1973." That the defendant has the right to call witnesses to testify at a hearing as to what the intention of the Court in Barcelona was in regard to its decision and of the parties in regard to the formal promise entered into by both Governments, Spain and the United States.

14. Defendant further notes that subsequent negotiations were carried on between defendant, Spain and the United States, pursuant to the aforementioned decision of the Court in Barcelona dated November 13, 1970, and the promise of the United States Government dated February 20, 1974, and that negotiations were

carried on prior to said decision and promise. That as a result of said negotiations, the defendant, Spain and the United States entered into an understanding and agreement that the defendant would only be tried for acts he committed within the confines of the United States between the dates of September 3, 1970 and April 30, 1971 and that in return, therefore, no further defense and/or opposition of his extradition would be made thereto; that defendant should be permitted to testify and call others to testify and prove same at a hearing before trial.

15. That the facts herein have only recently come into my knowledge and that the instant request for the relief hereunder was made as quickly as possible under the circumstances.

16. That the relief requested herein was in part requested in the papers drafted and served by Howard Diller, Esq., which resulted in the aforementioned decision of the Court, annexed hereto as Exhibit No. 1 , but the specific request for a final hearing before trial has not been made heretofore by filing final motion papers.

WHEREFORE, the defendant respectfully prays that this Honorable Court grant the following relief: dismissal of the indictment for lack of jurisdiction; amend the memorandum decision entered into by the Court to prohibit the introduction of any facts in the trial of the defendant herein that fall outside of the period delineated by the Spanish Court and

verified by the "formal promise", specifically September 3, 1970 through April 30, 1971; to grant the defendant a formal hearing; to grant the defendant the right to call witnesses on the issues presented by these papers; for an adjournment or a stay of the trial proceedings until these issues can be satisfactorily resolved; and for such other and further relief that this Court may deem necessary, proper and in the interest of justice.

STUART R. SHAW

SWORN TO before me this
7th day of April, 1976.

Notary Public, New York
Qualified in Nassau County
Commission Expires March 30, 1978

STATE OF NEW YORK)
COUNTY OF NEW YORK) SS.:

DIANE FUGALLI, being duly sworn, deposes and says: I am not a party to this action; I am over 18 years of age; I reside at Bayside, Queens, New York.

On June 7th, 1976, I served the within Brief and Appendix upon the following:

HON. ROBERT FISKE, JR.
United States Attorney for the
Southern District of New York
U.S. Courthouse Annex
One St. Andrews Plaza
New York, New York 10007

United States Court of Appeals
for the Second Circuit
United States Court House
Foley Square
New York, New York 10007 (10 copies having been served on the Clerk)

being the addresses designated for those purposes by depositing a true copy of same enclosed in a postpaid properly addressed wrapper, in a post office under the exclusive care and custody of the United States Postal Service within the State of New York.

Diane Fugalli
DIANE FUGALLI

Sworn to before me this
7th day of June, 1976.

Constance P. Medica
Notary Public

CONSTANCE P. MEDICA
Notary Public, State of New York
No. 03-7880580
Qualified in Queens County
Commission Expires March 30, 19.25